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No. 91-817

In The

Supreme Court of the United States

October Term, 1991

NOVARRO C. STAFFORD, M.D.,

Petitioner,

v.

BROTMAN MEDICAL CENTER, ALEXANDER DUBELMAN, M.D., GENERAL HEALTH SERVICES,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRINGTON, FOXX, DUBROW & CANTER
DALE B. GOLDFARB, Counsel of Record
JEAN M. CABILLOT
611 West Sixth Street, 30th Floor
Los Angeles, California 90017
(213) 489-3222

Attorneys for Defendants and Respondents, BROTMAN MEDICAL CENTER, GENERAL HEALTH SERVICES and ALEXANDER DUBELMAN, M.D.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does an interpretation by a California Court of Appeal of a state statute concerning discretionary dismissal for failure to prosecute constitute a federal question?

2. May petitioner allege the existence of a federal question by arguing that a state court's decision interpreting a state statute violated petitioner's rights to due process and equal protection?

3. Has petitioner presented a matter properly reviewable by this Court where the purported federal question asserted in the petition was not raised below, hence was not before the state court when it rendered its decision?

4. Assuming, *arguendo*, that the interpretation of a state civil procedure provision constitutes a federal question, has petitioner established the existence of a conflict between the decision in the present matter and a decision of another state court of last resort, a United States court of appeal, or other decisions of this Court?

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Brotman Medical Center, General Health Services, and Alexander Dubelman, M.D., Defendants and Respondents, respectfully submit this Brief in Opposition to the petition for a writ of certiorari filed by Novarro C. Stafford, Plaintiff, Appellant, and Petitioner herein.

STATEMENT OF THE CASE

In the present petition for writ of certiorari, petitioner, who has pursued this matter on and off for more than a decade, disingenuously attempts to argue that the interpretation of a state statute by a state court presents a federal question appropriate for review by this Court. Petitioner has never before argued the existence of a federal question, thus the state courts which have ruled on this case have not decided any question of federal law.

Petitioner, Novarro C. Stafford (hereinafter sometimes referred to as "Stafford"), brought an action against Brotman Medical Center, General Health Services, and Alexander Dubelman, M.D. (hereinafter sometimes referred to collectively as "Brotman"), alleging that he was wrongfully excluded from the rotation for the anesthesiology department after Brotman decided to close its anesthesiology staff.[1]

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[1] California law clearly allows a hospital to close any of its departments. *Mateo-Woodburn v. Fresno Community Hospital & Medical Center*, 221 Cal. App.3d 1169 (1990). The decision to close a department of a hospital is a quasi-legislative decision, which sets forth a rule to be applied in all future cases, as

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Stafford's action was filed on October 2, 1980, and dismissed pursuant to Brotman's motion for judgment on the pleadings, which was granted on March 2, 1984. Stafford appealed the trial court judgment, and the court of appeal determined that the trial court should have afforded Stafford an opportunity to amend his complaint to state a cause of action, and, upon those grounds, the action was remanded to the trial court on October 21, 1986, and the remittitur was filed on December 22, 1986.

After the remittitur on the court of appeal's decision, Stafford had a period of three years in which to bring his case to trial.[2] On November 21, 1989, when the action was over nine years old, and approximately one month before the action was subject to mandatory dismissal for failure to prosecute, the trial court granted Brotman's motion to dismiss for failure to prosecute.[3]

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opposed to a quasi-judicial decision, which involves the application of a decision to a specific set of existing facts. *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977). A court will not set aside a quasi-legislative decision "unless it is substantively irrational, unlawful, contrary to established public policy, or procedurally unfair." *Centeno v. Roseville Community Hospital*, 107 Cal.App.3d 62, at 73 (1979).

[2] California *Code of Civil Procedure*, Section 583.320, provides that an action which is remanded for a new trial by the court of appeal is subject to mandatory dismissal for failure to prosecute if it is not brought to trial within three years after the filing of the remittitur. A discretionary motion to dismiss for failure to prosecute may be brought, under California *Code of Civil Procedure*, Section 583.420, two years after the remittitur is filed.

[3] For the first two years after the remand of the case, Stafford's only actions in furtherance of the litigation were the

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Stafford once again appealed the trial court's ruling, but the ruling on the motion to dismiss was upheld by the trial court on a motion to reconsider, then by the court of appeal in a thoughtful and thorough opinion filed on June 3, 1991. On appeal, Stafford argued that he had diligently prosecuted the case, thus the trial court abused its discretion in granting respondents' motion.

Stafford brought a petition for rehearing, again arguing that the matter had been diligently prosecuted, which petition was denied on June 20, 1991.

Next, Stafford petitioned for review of this matter by the California Supreme Court. Petitioner abandoned his previous arguments, and created new theories in order to justify the attention of the California Supreme Court. In his petition, Stafford contended that a conflict existed among the state courts regarding how to weigh the various factors to be considered in determining whether a discretionary motion to dismiss should be granted. Although petitioner, in attempting to argue that a conflict

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service of two requests for production of documents, the first in 1987, the second in 1989, each of which resulted in a motion to compel production. No other discovery whatsoever was initiated by Stafford after the date of the remand. Further, Stafford never filed an at-issue memorandum, which would signal the court that the case was ready to be set at trial, nor did he bring a motion to obtain a trial date. Stafford did not so much as informally seek the scheduling of a trial date until the subject was raised at a status conference on September 28, 1989, barely three months before the expiration of the three-year period for mandatory dismissal.

existed, utilized the appropriate catch phrases, his petition was denied by the California Supreme Court on August 21, 1991.

Stafford has now sought review of his case by this Court. As with his petition before the California Supreme Court, Stafford has attempted to find some grounds for review by this Court which create the impression that a federal question exists. Stafford's petition appears to contend that his rights to due process and equal protection were violated by the application of the California *Code of Civil Procedure*, Section 583.420. Obviously, any aggrieved party which disputes an adverse ruling can claim that the statutory basis for the ruling is unfair, thus implicating, in some nebulous way, the unhappy litigant's Fourteenth Amendment rights.

In the present matter, however, the statute at issue is simply a procedural provision for governing the passage of cases through the court system. No substantive statute is involved. Further, petitioner had control of the litigation of his action, thus could have avoided the possibility of dismissal merely by causing the matter to be tried within two years after the remittitur was filed.[4]

Thus, Stafford has not presented any issue which is appropriate for consideration by this Court.

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[4] The action would have been over eight years old even if it had been brought to trial two years after the remittitur.

ARGUMENT

1. STAFFORD HAS FAILED TO STATE ANY LEGITIMATE GROUNDS FOR REVIEW BY THIS COURT OF THE CALIFORNIA COURT OF APPEAL DECISION.

The *Rules of the Supreme Court of the United States*, Rule 10.1., states that review by this Court of a state court decision is proper:

> "(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

This Court's decisions regarding whether to grant petitions for certiorari are wholly discretionary. *Durham v. U.S.*, 91 S.Ct. 858, 401 U.S. 481, 28 L.Ed.2d 200 (1971). Such discretionary petitions will be granted only where there are special and important matters to be addressed by the Court. *Fay v. Noia*, 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837 (1963).

Where the federal question forming the basis for a petition for certiorari is not raised when the matter is addressed by the state courts, the question is not open in proceeding on a petition for certiorari. *Ellis v. Dixon*, 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231 (1955), rehearing denied 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759 (1955).

In the present matter, petitioner did not assert the existence of a federal question until the present petition to this Court. Thus, no federal question was addressed by the California courts and there are no grounds for review by this Court of the state court's decision.

2. CONTRARY TO THE REPRESENTATIONS CONTAINED IN STAFFORD'S PETITION FOR WRIT OF CERTIORARI, HE NEVER RAISED ANY QUESTION OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION PRIOR TO THE FILING OF THE PRESENT PETITION TO THIS COURT.

Rule 14(h) of the *Rules of the Supreme Court of the United States* provides that a petitioner specify the stage of the proceedings at which the federal questions sought to be reviewed were raised.

Petitioner has not, and cannot, provide the Court with such information in that the federal questions which petitioner purports to raise here were not asserted below.

At page 11, footnote 1, of his petition, Stafford makes the following statement with respect to his failure to raise these questions below:

> "This Court must recognize that civil litigants in routine state court proceedings do not explicitly invoke their Fourteenth Amendment rights regarding the application of routine state procedural law."

Thus, petitioner admits that he did not raise in the courts below the federal questions which he now asserts.

Petitioner has included quotations from his various briefs and petitions which he has characterized as evidence that he implicitly asserted his rights to due process and equal protection. The quotations, however, do nothing more than illustrate how petitioner failed to adequately raise any such federal question below.

Indeed, each of the arguments contained in petitioner's brief to the court of appeal and his petition for rehearing merely discuss the actions taken by petitioner in litigating the matter prior to the dismissal, in an attempt to demonstrate that the matter was pursued with sufficient diligence.

In his petition to the California Supreme Court, petitioner changed his arguments entirely. There he argued exclusively that there were conflicts in the decisions rendered by the California courts interpreting the standards for discretionary dismissal.

While petitioner's contention that the application of admittedly "routine" state procedural law to his "routine" action violated his Fourteenth Amendment rights is questionable at best, the Court need not reach that stage of the analysis.

Petitioner's argument for a lenient construction of Rule 14(h) is insupportable. Stafford asks this Court to broaden its jurisdiction to address matters never considered by the courts below. As this matter has wound its way through the courts, petitioner created new arguments in obvious attempts to bring the matter within the jurisdiction of those courts. While petitioner has shown great creativity, the courts below were not privy to those

arguments, thus could not have based their decisions on those arguments.

Regardless of whether he raised the existence of a federal question at the trial level, petitioner had ample opportunity to make such an argument before the court of appeal, or upon his petition for rehearing, or upon his petition for review by the California Supreme Court. In that petitioner did not put a federal question before the courts below, their decisions could not have been based upon any purported violation of petitioner's rights to due process and equal protection. Therefore, petitioner is not entitled to a review of the state court's decision by this Court.

3. NONE OF PETITIONER'S REASONS FOR GRANTING THE WRIT SETS FORTH AN IMPORTANT QUESTION OF FEDERAL LAW APPROPRIATE FOR CONSIDERATION BY THIS COURT.

Petitioner has set forth the following reasons for granting his petition:

> 1. In violation of litigants' due process rights, the overloaded court system in California uses highly technical dismissals to reduce its case-load;
>
> 2. In violation of litigants' due process and equal protection rights, proceeding to trial on the merits in California depends more upon the "luck of the draw" than upon the circumstances of the case;
>
> 3. The petition presents the Court with an opportunity to address the violation of litigants' due process and equal protection rights which

arise out of the state courts' use of the dismissal statutes for improper purposes.

As discussed above, none of these arguments have been presented to the courts below, thus should not be addressed by this Court.

Further, while it is obvious that petitioner has labored to frame his situation in terms which apparently pertain to important federal question, his presentation of these issues are at odds with the reality of petitioner's situation.

More than nine years had passed since the filing of Stafford's action when it was dismissed for failure to prosecute. When respondents' motion was heard, the case was one month away from being subject to mandatory dismissal.

Petitioner, in his papers below, blamed the courts, the court clerks, and respondents for his delays. Yet it was the responsibility of petitioner, and no one else, to bring the action to trial. Petitioner never argued, nor could he have argued, that he was actually prevented from bringing the case to trial at any time.[5] Had petitioner taken the necessary steps to try his case in an expedient manner, respondents would not have been in a position to seek, let alone secure, dismissal of the action for failure to prosecute.

Petitioner was in complete control of the progress of his suit, and was not a casualty of the "luck of the draw"

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[5] In fact, respondents did not oppose petitioner's eleventh-hour attempt to secure a trial date.

or of "highly technical" dismissal statutes. Litigants in California, as in every other state, are required to comply with the state's provisions governing the progress of lawsuits.

Petitioner has not directly challenged the constitutionality of the statute, although he appears to argue that there should be no discretionary statutes whatsoever in that there is a potential that they will be unevenly applied. This fanciful argument, which constitutes the basis of the present petition, was never raised prior to the filing of the present petition. Therefore, Stafford is not entitled to a review by this Court of the court of appeal's opinion.

CONCLUSION

For all of the reasons discussed above and in the court of appeal's opinion, this Court should deny this petition for a writ of certiorari.

DATED: December 18, 1991

Respectfully submitted,

HARRINGTON, FOXX, DUBROW & CANTER
DALE B. GOLDFARB, Counsel of Record
JEAN M. CABILLOT

Attorneys for Defendants and Respondents, Brotman Medical Center, General Health Services, and Alexander Dubelman, M.D.